NO. 21368

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRAVIS TRUMAN LOTT, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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JURISDICTION AND STATEMENT OF THE CASE

The appellant, Travis Truman Lott, Jr., was indicted on February 9, 1966, by the Federal Grand Jury for the Southern District of California, Central Division. 1/

This indictment charges appellant Lott, together with one Raymond Beckles, with the robbery of Culver Federal Savings and Loan Association on January 26, 1966, and the placing of lives in jeopardy in committing the offense by the use of a .38 caliber

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1/ C. T. 2; "C. T." refers to Clerk's Transcript of Proceedings.

revolver [C. T. 2].

The appellant was arraigned on February 23, 1966, and the Court ordered a plea of not guilty entered when the defendant refused to enter plea [C. T. 10].

Trial by jury commenced as to appellant on April 5, 1966, before the Honorable Irving Hill, United States District Judge [C. T. 18], the co-defendant Beckles having changed his plea to guilty prior to trial [C. T. 14]. On April 12, 1966, the jury returned a verdict of guilty as charged in the indictment [C. T. 35-36].

On May 2, 1966, the appellant was sentenced to imprisonment for a period of 20 years [C. T. 48-49].

Appellant filed notice of appeal on May 6, 1966 [C. T. 52, 65].

The jurisdiction of the District Court is predicated on Title 18, United States Code, Sections 2113(a) and (d), and Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28 of the United States Code.

STATUTE INVOLVED

Title 18, United States Code, Section 2113(a) and (d) provides in pertinent part:

"(a) Whoever by force and violence or by intimidation, takes, or attempts to take, from the

person or presence of another any property or any other thing of value belonging to, or in the care, custody, control, management or possession of any bank or any savings and loan association. . . .

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (d) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than 25 years, or both."

STATEMENT OF FACTS

On January 26, 1966, at approximately 3:30 P. M. two men entered the Culver City Federal Savings and Loan Association, which was an insured institution as defined in 18 U. S. C. §2113(g) [R. T. pp. 174-177]. 2/ They asked Mrs. Lelia Blake, who was secretary to the president, in the presence of C. William Jackson, who was vice-president and controller of the bank, if they could see a loan officer [R. T. 178, 194]. Mrs. Blake excused herself to find the loan officer, and Mr. Jackson went back to his work [R. T. 178, 195]. The telephone rang, and Mrs. Blake answered it - the next thing she knew, one of the two men was standing in front

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2/ "R. T." refers to Reporter's Transcript of Proceedings.

of her desk saying, "Get off the phone" [R. T. 195]. Mr. Jackson, looked to his left and saw one of the two men who had asked to see a loan officer standing with a briefcase in one hand, and a revolver in the other. That man was the defendant Travis Truman Lott, Jr., appellant here [R. T. 178].

Mr. Donald Boss, the loan service officer at the bank, had come from the vault room and was talking to the girl who does their bookkeeping, when he suddenly felt something jabbed in his back. He turned around and saw the defendant Lott standing with a revolver [R. T. 215-216].

The people in the bank were all "herded" into a kitchen area in the back of the building, where they were instructed by the defendant Lott to lie on the floor [R. T. 184-185; 195-197].

Co-defendant Beckles, who had come in with the defendant, stated, "I need a key". Whereupon the defendant said, "Allright. Somebody better come up with the key, or someone is going to get hurt." [R. T. 185].

Mr. Jackson, who held one key under the bank's dual cash system, unlocked the safe for the defendants, and inserted his key into the cash compartment. He was then pushed into a corner by Beckles, who examined the safe and then said, "Let's go get the other key" [R. T. 185]. He brought Mr. Jackson back to the kitchen, where Jackson took his place on the floor again, and Mr. Golinsky, the bank's assistant controller, went back to the vault with the co-defendant, and swung open the door to the cash compartment [R. T. 185-186; 208].

Mr. Golinsky watched the co-defendant remove the cash box and place it into a brief case, whereupon Mr. Golinsky was led by the coat back into the kitchen, where he sat down, as instructed, and bowed his head [R. T. 207-209].

The defendant Lott crossed the kitchen area, and then turned and said, "Nobody move for five minutes" [R. T. 186, 209]. The robbers disappeared, and the people lying on the kitchen floor heard the door leading outside slam [R. T. 186].

Then Mr. Golinsky stood up on a chair and through the window observed what he believed to be the getaway car take off at a fast rate of speed, traveling south on Midway Avenue in Culver City [R. T. 209-210]. The automobile was a 1964 green Chevrolet station wagon, which had been parked just outside the building [R. T. 212].

Police Officer William Hebrard was in his patrol car when he received an all-units broadcast describing the bank robbers as "two male negroes, dark suit, light suit, mustache, dark glasses, driving a '64 green Chevrolet Station Wagon". Hearing that they had departed going south on Midway, Officer Hebrard placed his patrol car in the driveway of MGM Studios' parking lot, which was about one mile south of the bank on Overland Boulevard [R. T. 219-221].

Shortly thereafter, he observed a green '64 Chevrolet station wagon carrying two male negroes, one wearing a dark suit and the other a light one, one having a mustache and dark glasses [R. T. 221]. Officer Hebrard pulled alongside the automobile and

motioned toward the curb. The defendant Lott, who was driving, nodded that he understood the officer's request, pulled around the corner slowly, and then took off at a high rate of speed [R. T. 221-222].

The police officer assumed pursuit in a chase that involving zigzagging "from clear across the road, one lane to the other, and coming back in whenever they could find an opening" [R. T. 223]. Officer Hebrard had his red light and siren on, and when the defendant failed to stop, the policeman began firing. He fired five shots [R. T. 223].

His last shot, together with the high speed and the zizzagging, caused the fleeing auto to spin out, and the defendants crashed into a parked car. The officer backed in and rammed the vehicle from the front, pinning in the defendant's automobile [R. T. 223].

The robbers got out on the passenger side, and split up, one ran east and the other, the defendant Lott, went west [R. T. 223]. Officer Hebrard unsuccessfully yelled for them to stop and fired more shots, but had to remain with the automobile - for he assumed that the bank money was still in the car when the defendants ran without carrying anything in their hands [R. T. 224].

In the back seat of that vehicle, Officer Hebrard found a briefcase, and in it a cash box containing $5,163.31 [R. T. 224-226, 259], the same amount of money which had been plundered from the bank [R. T. 187-188]. Also found in the car was a business card bearing the words, "Travis Lott, Collector, Assessor" [R. T. 257-259] and between the door and the seat on the drivers side of the

floorboard a loaded gun was discovered [R. T. 234-235], which bore the fingerprints of the defendant Lott [R. T. 266-272], and which appeared to be the one used in the robbery [R. T. 182, 195-196, 205-206, 216-217].

Another police officer, Harry Hartinian, while on patrol received a description regarding the flight of the suspects, and heard that one was west bound on Berryman and Sepulveda, wearing a dark suit, dark glasses, a mustache, and was running between houses and jumping fences [R. T. 244-245]. Hartinian proceeded to Culver Park Drive and Berryman, west bound, where, at approximately 3:40 P. M., he observed and arrested the defendant Lott, who was wearing a dark suit, dark glasses and had a mustache. The defendant had perspiration on his forehead and his breathing was not normal. His clothes bore the debris and residue of redwood paint, and had grass stains. This apprehension was located about four blocks from the spot where Officer Hebrard rammed the bank robbers' vehicle [R. T. 245-247].

At the trial, defendant Lott chose to take the stand. He told the following story: On the morning of the robbery he received a telephone call from Raymond Beckles, the co-defendant in the case [R. T. 289]. They decided to go to the race track that day, as they were "hoping to strike it rich" [R. T. 290]. Together with another friend, they got into Lott's Chevrolet station wagon and went to Santa Anita, which is about 34 miles from Culver City, where they remained until about 2:30 P. M. [R. T. 291]. Beckles and the friend left defendant Lott off at his sister's home in Venice, California,

at about 3:00 P. M. Lott told them to return promptly with his car as he had to be home by 4:00 [R. T. 291-292]. Lott said that his sister was not home, but he decided to wait, as she usually gets home about 3:30 [R. T. 292]. After waiting for fifteen minutes or half an hour, Lott decided to "just walk up to Culver City and see where they were and what they were doing" [R. T. 293-294]. Whereupon, he was arrested [R. T. 295].

Lott stated at the trial that he had handled the gun that day in the car on the way to the race track. Beckles, according to Lott, was sitting in the back seat behind Lott, who was driving. Lott had his right hand on the steering wheel and, when Beckles said, "Look at this", Lott reached back with his left and took the gun, examined it, and then handed it back to Beckels, saying, "Here man, take this. I don't want nothing to do with this. I can't be messing around with a gun." [R. T. 295-297].

Lott explained that the reason he had taken his tie off when found by the police on the day of his arrest, January 26, 1966, was "because it was really hot that day. In fact, I think it was around 97 degrees." [R. T. 301].

He explained the paint and grass stains, saying, "I might have picked up some debris, you know, that was laying on the grass on this lady's front lawn" [R. T. 302], and his perspiration was due, he said, to the fact that he'd been walking for ten of fifteen minutes and it was so hot [R. T. 302].

On cross-examination, Lott was asked whether he hadn't previously told an FBI agent that he had parked the car himself in

front of the bank, left the car's motor running, with his wallet and keys in the automobile, and that someone then stole his car, and when arrested he was wandering around trying to find the police so that he could report the theft of his vehicle [R. T. 311]. He was asked if he hadn't also told the FBI that the gun was his and that he had "bought it from a person in East Los Angeles through a female friend of Ray's" [R. T. 312]. He denied making these prior statements [R. T. 311-313]. He did, however, admit that he had a prior robbery conviction, for which he served six years and eight months in prison [R. T. 321].

Agent Carl Schlatter, who had been employed by the Federal Bureau of Investigation for over 19 years, was called as a rebuttal witness and testified to the existence of the prior statements which the defendant had denied making [R. T. 324, 327-331]. Agent Schlatter stated that he had interviewed the defendant Lott in the presence of another agent, immediately after the defendant was arraigned by the commissioner [R. T. 325-326]. The commissioner, who had initiated the question of counsel, delayed the hearing until later in the day so that the defendant could obtain a private lawyer [R. T. 336, 346, 350-351].

Although the defendant testified that he had requested and desired an attorney during the interrogation by Agent Schlatter, who had failed to advise him of the right to counsel, Agent Schlatter testified he had informed the defendant that he could have an attorney appointed for him by the court, and that before saying anything to the agents he could contact and discuss with a lawyer,

or anyone else he chose [R. T. 326]. He also advised Lott of his right to remain silent, and told him that anything he did say could be used against him in a court of law [R. T. 326]. Regarding the defendant's testimony that Agent Schlatter had told him his statements would be "off the record" [R. T. 335-338], and that he had repeatedly requested an attorney's presence, Agent Schlatter testified as follows:

DIRECT EXAMINATION

"Q. BY MR. BALABAN: Mr. Schlatter, calling your attention again to January 27th of 1966, and to the conversation about which you have previously testified, at any time during that conversation with the defendant did the defendant ask to speak to an attorney?

"A. No, he did not.

"Q. Did he ever tell you that he didn't want to talk to you until he had spoken to an attorney?

"A. No, he did not.

"Q. Had you told him he could speak to an attorney and you would wait until he consulted with an attorney if he cared to do so?

"A. Yes. I had told him that he didn't have to talk until he had seen an attorney. And he said he was well aware of his rights. That he would -- it would not be necessary for him to talk to an

attorney before talking to us.

"MR. BALABAN: Nothing further.

"THE COURT: Mr. Schlatter, was there anything said in your conversation with the defendant that you told us about his statements made to you being off the record?

"THE WITNESS: No, sir. I told him, your Honor, that anything he said to us could be used against him in a court of law and, therefore, couldn't be possibly off the record." [R. T. pp. 345 and 346].

Following the taking of all offered testimony on the question of voluntariness, the following proceedings took place in open court outside the presence and hearing of the jury:

"THE COURT: First, before we commence discussing instructions, gentlemen -- and let the record show the jury is not present -- although no motion to suppress has been made in this case, and no other motion is pending before me, I want to put on the record my findings as to the admissions testified to by Agent Schlatter at the end of this morning's session.

"I will find that the defendant had been fully and properly advised as to his constitutional rights at all stages prior to the admissions having been

made. And I will further find that there has been no denial of the right to counsel in connection with these admissions as enunciated in Escobedo and the related cases.

"I also find that the admissions were voluntary and not coerced.

"Now, having made those findings, Mr. Bueno, I will give, if you wish, among the instructions Mathes and Devitt Nos. 8.19 and 8.20, which deal with voluntary admissions, and direct the jury to disregard admissions they find to have been involuntary and coerced.

"Would you request such instructions?

"MR. BUENO: Yes, I would, your Honor.

"THE COURT: Then I will pass out a revision of Mathes and Devitt 8.20 on when admissions are involuntary. And let me pass out to you, Mr. Bueno, Mathes and Devitt itself so that you can see No. 8.19, and read it in relationship to this special instruction No. 1 of the court, which I have, as I say, used 8.20 as the model, and revised it.

(Counsel reading).

"THE COURT: Have you had a chance to read those, Mr. Bueno?

"MR. BUENO: Yes, I have.

"THE COURT: Will 8.19 and the court's special No. 1 cover the matter satisfactorily as far

as you are concerned?

"MR. BUENO: Yes, your Honor.

"THE COURT: Do you have anything else to request with respect to the voluntariness and lack of coercion, or coercion as to these admissions?

"MR. BUENO: Nothing else, your Honor."

[R. T. 353-354].

ARGUMENT

I

THERE WAS NO ERROR IN TRIAL COURT'S FINDING THAT APPELLANT HAD NOT BEEN DENIED ANY RIGHTS PRESCRIBED IN ESCOBEDO v. ILLINOIS, WHERE APPELLANT HAD BEEN WARNED OF HIS RIGHTS BY THE U.S. COMMISSIONER AND BY THE FBI, PRIOR TO INTERVIEW, AND HAD TOLD THE AGENT THAT HE FELT A LAWYER'S PRESENCE PRIOR TO INTERVIEW WAS UNNECESSARY.

Preliminarily, it should be noted that Miranda v. Arizona, cited by appellant in his opening brief at page 9, 384 U.S. 436 (1966), has no application to this appeal. Rather, Escobedo v. Illinois, 378 U.S. 478 (1964) would be relevant since appellant's trial took place in April of 1966, which was prior to the date of the Miranda opinion [C. T. 18, 31-36]. Johnson v. New Jersey, 384 U.S. 719 (1966).

Appellant contends that the statements used to impeach his testimony at trial were elicited in violation of his constitutional rights, and that the trial court's specific finding to the contrary

[R. T. 353] was erroneous. This contention is based on the reasoning that because the Commissioner, upon his own initiative [R. T. 348, 350-351] had continued the preliminary hearing so that appellant might obtain an attorney, appellant could not thereafter be interviewed in the absence of an attorney, despite the fact that he was advised of his constitutional rights by the Commissioner [R. T. 337] and warned again by the F. B. I. agent prior to interview [R. T. 326], and, after all this precautioning, appellant stated that he felt the presence of a lawyer was unnecessary [R. T. 345-346] prior to the interview.

In this regard, appellant cites Queen v. United States, 335 F. 2d 297 (D. C. Cir., 1964); United States v. Guerra, 334 F. 2d 138, 144 (2nd Cir., 1964); Ricks v. United States, 334 F. 2d 964, 969-70 (D. C. Cir., 1964); and Johnson v. United States, 344 F. 2d 163 (D. C. Cir., 1964). These cases are all factually distinguishable.

In Johnson, the appellants were questioned by police officers without any indication that they were warned of their constitutional rights or waived any such rights.

In Guerra, the questioning took place post-indictment, there was no mention of whether appellant had been warned of his rights, and the record was said to have provided "no indication whatsoever as to the nature, duration, or extent of this interrogation" (Guerra, supra, at pp. 144-145). Even there, the use of the statements introduced in an abortive attempt to impeach the defendant on a minor issue was held not to require reversal.

In Queen, there was no advice as to right to have counsel

present, and nothing to indicate a waiver of counsel. In fact, the interviewing officer in Queen, knew that the defendant had either "obtained a lawyer, was in the process of obtaining one, or was going to do so. He was not sure which of these answers she gave." (Queen, supra, at p. 298)

In Ricks, the court first held that the prisoner had not been taken before a magistrate without unnecessary delay. When he was brought before a magistrate, he was not advised that he could have counsel appointed for him. The preliminary hearing was postponed for the defendant to obtain counsel. He was thereafter taken before a District Judge who told him that he did not have to go with the police and that anything which transpired could be used against him. "The judge did not tell Ricks that he had a right to counsel nor did he offer to appoint counsel" (Ricks, supra, at p. 967). Ricks was then released to the police for a period of four hours, during which he repeated his earlier admissions (held inadmissible under Mallory v. United States, 354 U.S. 449 (1957),) and all of the defendant's statements were admitted into evidence over his objection.

Even assuming that the foregoing Ricks and Queen cases were factually compelling, their reasoning has not been found universally compelling, even to another three-judge panel of their own D.C. Circuit. 3/ And the Sixth Circuit, in United States v.

3/ c.f. Cephus v. United States, 352 F.2d 663, 665 (D.C. Cir. 1965)

Hensley, 374 F. 2d 341 (6th Cir., 1967) wrote, at pp. 350-351:

" ... The first of these claims is that the government agents who interrogated appellants did so after they had retained counsel and without notice to or agreement of said counsel. In this regard appellants rely upon Massiah v. United States (377 U. S. 201, 1964); Ricks v. United States, ... 334 F. 2d 964 (C. A. D. C. 1964); Queen v. United States, ... 335 F. 2d 297 (C. A. D. C., 1964). We have already noted that appellants herein had not been indicted as of the time of their confessions, whereas Massiah had been. In Ricks and Queen, the Appellate Court for the District of Columbia (on considerably different facts than those in the instant appeals) and with distinctive federal law applicable to the District of Columbia (see 2-2202 D. C. Code) held in effect that the fact that Massiah had been indicted and had retained counsel did not constitute substantial factual distinction between the facts relevant to Massiah's statement and those of Queen and Ricks wherein neither of these things were true. These opinions we read as educated anticipations of the rules laid down subsequently by the Supreme Court in Miranda v. State of Arizona, supra. But we also feel that the Supreme Court's refusal to make the Miranda rule retroactive

indicates that it clearly did not in Massiah contemplate a barring of all in-custody confessions without counsel present or agreeing to interrogation.

"We hold that Massiah v. United States, supra, is distinguishable from our instant appeals on important factual differences. Further, on the authority of Davis v. State of North Carolina, 384 U.S. 737, (1966), we decline to follow the suggested import of Queen and Ricks until after the date of the Miranda decision (June 13, 1966).

"Just as important to our decision is the fact that the record allowed the judge and jury to find from disputed facts as to each appellant either that (1) he had not retained counsel, or (2) that he had freely and voluntarily waived the presence of counsel at interrogation."

Similarly, in the instant Lott appeal, there were sufficient facts for the court and jury to find that the accused had freely and voluntarily waived the presence of counsel at interrogation. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. Johnson v. Zerbst 304 U.S. 458, 464 (1938).

Appellant Lott testified that he was a real estate rent and trust deed collector [R. T. 300], had worked as collector for the property manager of the Jefferson Savings & Loan Association [R. T. 300] at an average income of $200.00 a week [R. T. 321], had formed a maintenance company with his brother which served three banks [R. T. 322], worked with his father's real estate office [R. T. 323], "and various other enterprises" [R. T. 323], and had served over six years in prison [R. T. 320-321]. This defendant was, as Judge Ely described one in Calhoun v. United States, 368 F.2d 59, 61 (9th Cir., 1966), "wary, knowledgeable, and free from coercion (and) was disinterested in legal advice at the time of his interrogation. From the testimony, it (appeared) that (he) was confident of his ability to establish, by persuasion, his own innocence."

It would be a strange situation indeed, if once a Commissioner on his own initiative, postponed a preliminary hearing for a defendant to obtain an attorney, that defendant could never thereafter elect to proceed without one. In United States v. Plata, 361 F.2d 958 (7th Cir., 1966), after being advised of his rights, the defendant stated that he desired to consult the lawyer who had represented him in business, and two unsuccessful attempts were made to reach him by telephone. No request was made that any other lawyer be contacted. There the court said, "We think that the inference is inescapable that defendant, with his knowledge of his right to counsel, voluntarily responded to the agent's inquiry." (p. 961). And even more recently, the same Circuit has held,

in a post-indictment case where an attorney had already been appointed and the defendant was arrested on a bench warrant issued after a failure to appear, that subsequent statements by the accused, made after a full constitutional warning, could be used against him. United States v. Thomas Patrick Smith, #15878, 7th Cir., June 22, 1967; (corrected to: #15878, 7th Cir., September term 1966, April session 1967).

In the instant case, the trial court's finding, outside of the presence of the jury, that "there has been no denial of the right to counsel in connection with these admissions as enunciated in Escobedo and the related cases [R. T. 353]" was clearly correct.

CONCLUSION

An examination of the entire record indicates that appellant received a fair trial and, there being no prejudicial error, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William Gargaro, Jr.
WILLIAM J. GARGARO, JR.